

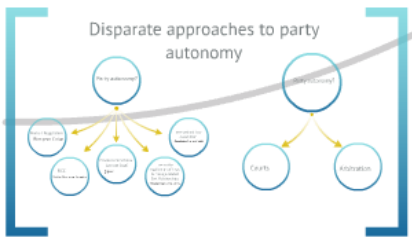
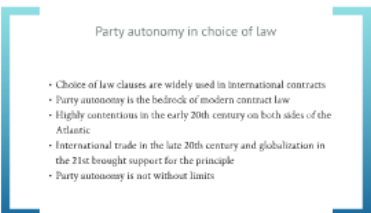
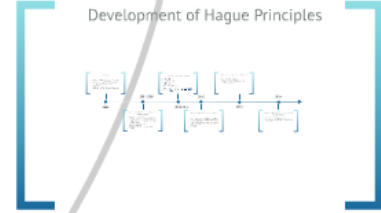
# Party Autonomy and its Limits

## The new Hague Principles on Choice of Law in International Contracts

18 October 2013

Brooklyn Journal of International Law Symposium

Marta Pertegás  
First Secretary



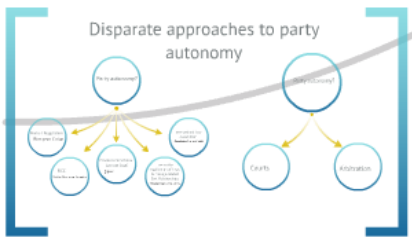
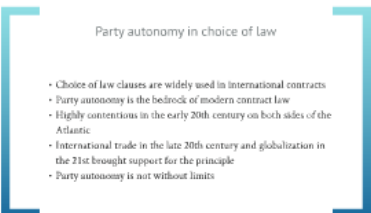
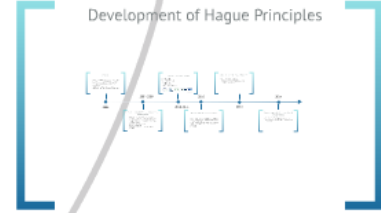
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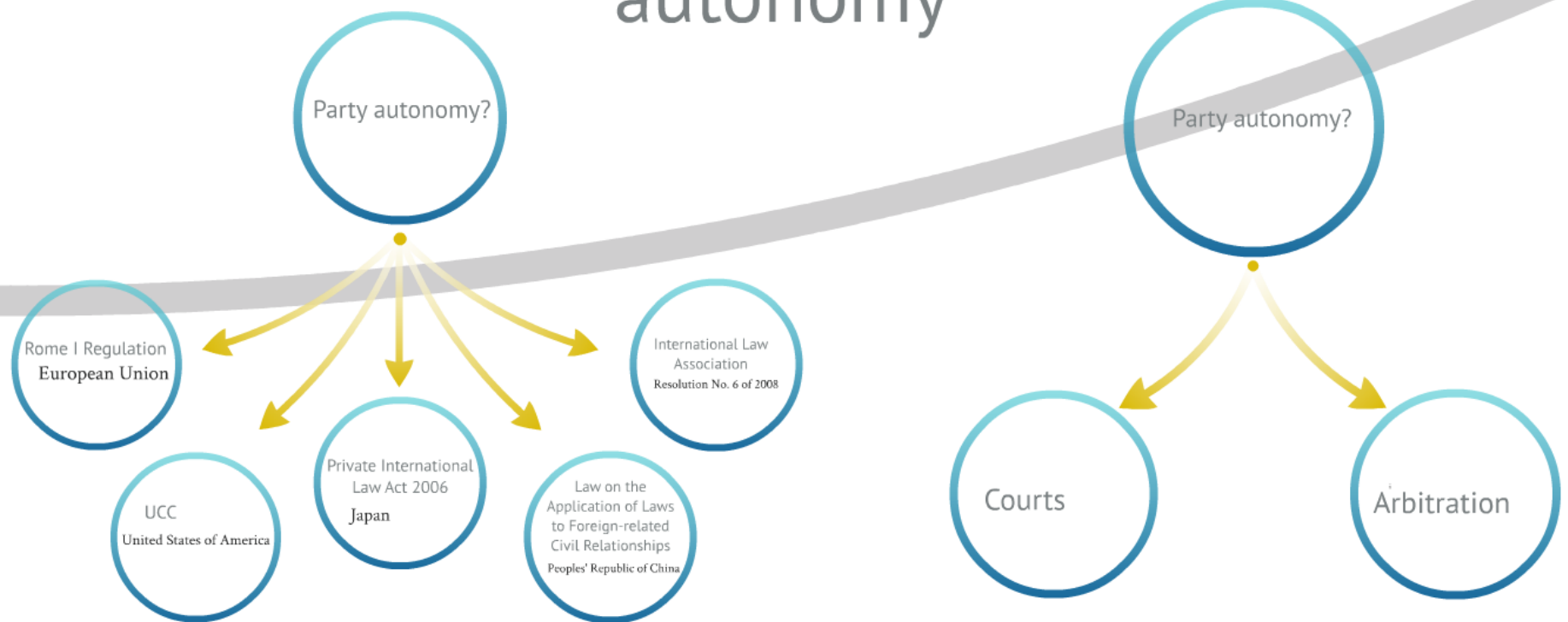
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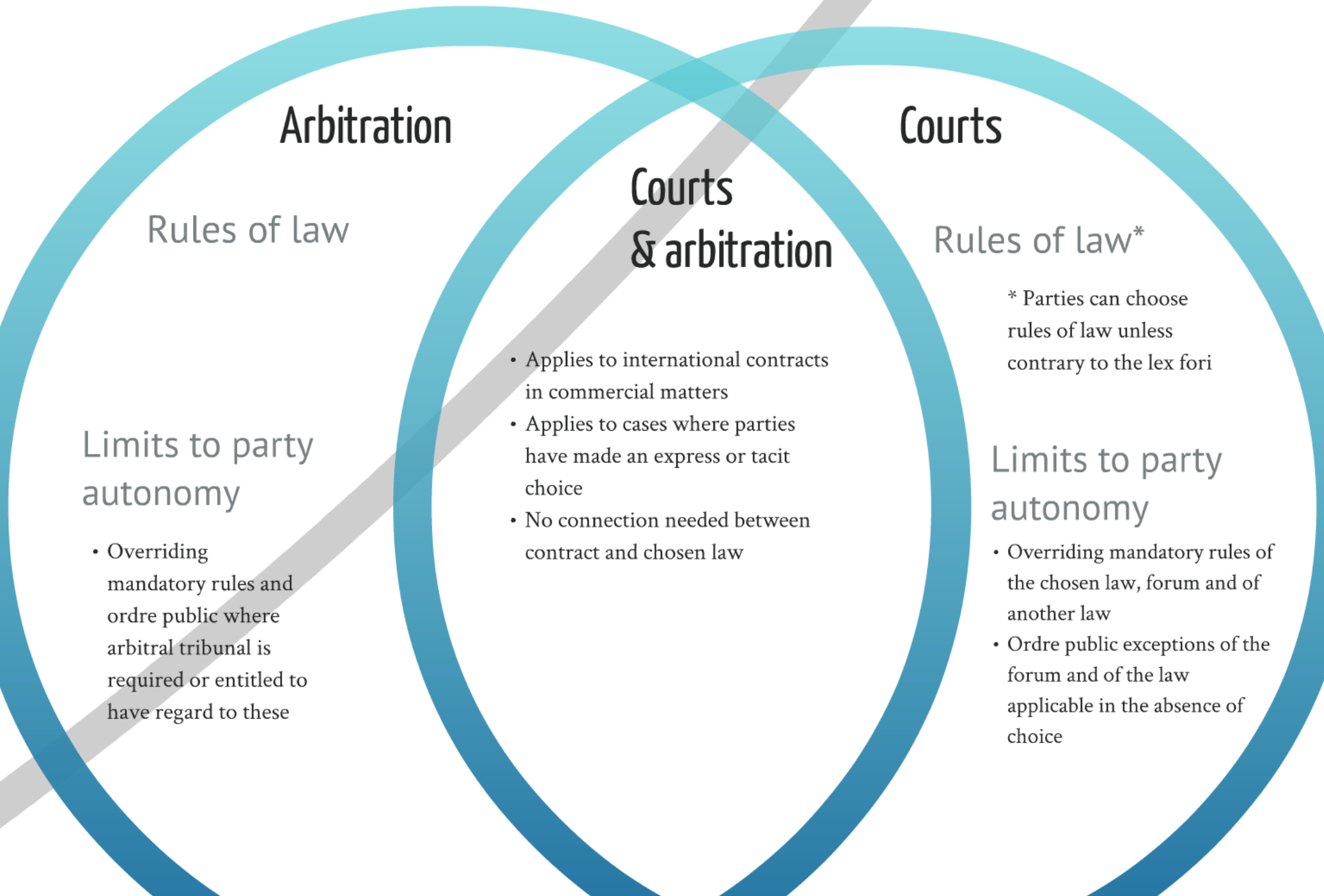
## Party autonomy in choice of law

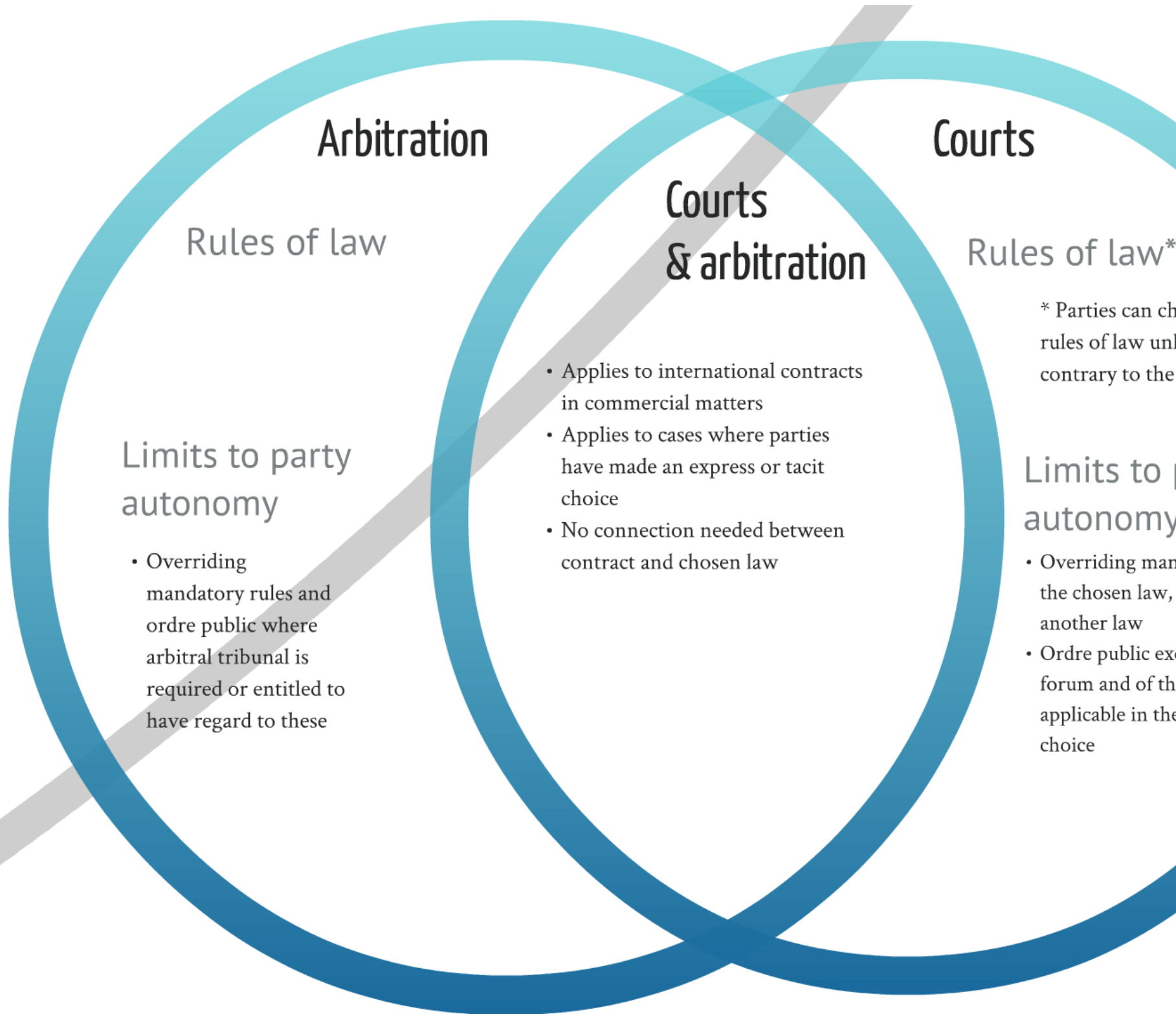
- Choice of law clauses are widely used in international contracts
- Party autonomy is the bedrock of modern contract law
- Highly contentious in the early 20th century on both sides of the Atlantic
- International trade in the late 20th century and globalization in the 21st brought support for the principle
- Party autonomy is not without limits

# Disparate approaches to party autonomy



# Limits to party autonomy





## Arbitration

Rules of law

### Limits to party autonomy

- Overriding mandatory rules and ordre public where arbitral tribunal is required or entitled to have regard to these

## Courts & arbitration

- Applies to international contracts in commercial matters
- Applies to cases where parties have made an express or tacit choice
- No connection needed between contract and chosen law

## Courts

Rules of law\*

\* Parties can choose rules of law unless contrary to the law

### Limits to party autonomy

- Overriding mandatory rules, the chosen law, for another law
- Ordre public exception of the forum and of the law applicable in the chosen law

# Arbitration

# Courts

## Courts & arbitration

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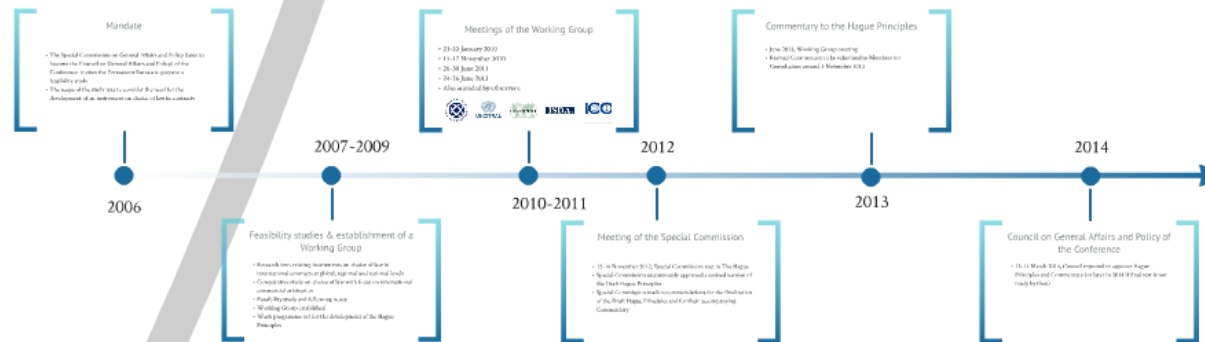
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\* Parties can choose rules of law unless contrary to the lex fori

## Limits to party autonomy

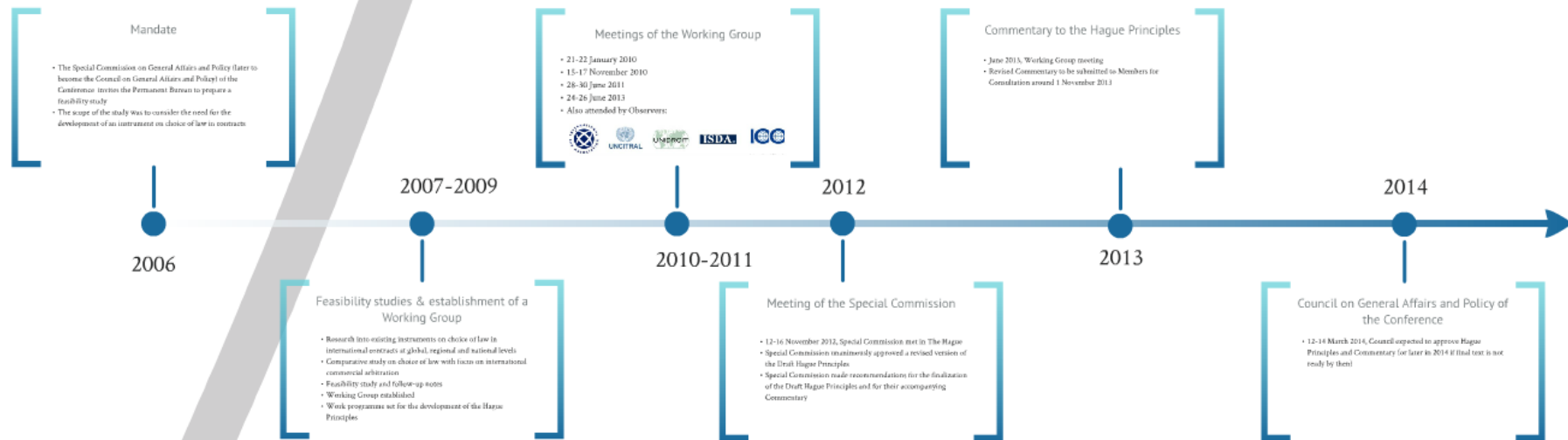
- Overriding mandatory rules of the chosen law, forum and of another law
- Ordre public exceptions of the forum and of the law applicable in the absence of choice

# Development of Hague Principles





# Development of Hague Principles



# Mandate

- The Special Commission on General Affairs and Policy (later to become the Council on General Affairs and Policy) of the Conference invites the Permanent Bureau to prepare a feasibility study
- The scope of the study was to consider the need for the development of an instrument on choice of law in contracts



# Feasibility studies & establishment of a Working Group

- Research into existing instruments on choice of law in international contracts at global, regional and national levels
- Comparative study on choice of law with focus on international commercial arbitration
- Feasibility study and follow-up notes
- Working Group established
- Work programme set for the development of the Hague Principles

# Meetings of the Working Group

- 21-22 January 2010
- 15-17 November 2010
- 28-30 June 2011
- 24-26 June 2013
- Also attended by Observers:



# 2011

## Meeting of the Special Commission



- 12-16 November 2012, Special Commission met in The Hague
- Special Commission unanimously approved a revised version of the Draft Hague Principles
- Special Commission made recommendations for the finalization of the Draft Hague Principles and for their accompanying Commentary

# Commentary to the Hague Principles

- June 2013, Working Group meeting
- Revised Commentary to be submitted to Members for Consultation around 1 November 2013



# Council on General Affairs and Policy of the Conference

- 12-14 March 2014, Council expected to approve Hague Principles and Commentary (or later in 2014 if final text is not ready by then)
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# Goal: convergence at two levels

1. Develop best practices to party autonomy in choice of law
2. Approximate the approach to party autonomy as between courts and arbitral tribunals

Why? Creates legal certainty



## Goal: convergence at two levels

1. Develop best practices to party autonomy in choice of law
2. Approximate the approach to party autonomy as between courts and arbitral tribunals

Why? Creates legal certainty

How? Non-binding instrument will serve as a global model for uniform approaches to reform

For whom? National legislators, regional regulators, courts and arbitral tribunals

